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No. 80-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,
Appellant,

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS and SAW MILL VALLEY CIVIC ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF AMICI CURIAE INDEPENDENT SECTOR AND THE FOLLOWING MEMBER ORGANIZATIONS INDIVIDUALLY: AMERICAN RED CROSS, EPILEPSY FOUNDATION OF AMERICA, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., NATIONAL CONCILIO OF AMERICA, VOLUNTEER: THE NATIONAL CENTER FOR CITIZEN INVOLVEMENT, AND THE AMERICAN ASSOCIATION OF MUSEUMS; AND THE NATIONAL ASSOCIATION OF NEIGHBORHOODS

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This brief *amicus curiae* is submitted by Independent Sector and the following member organizations individually: American Red Cross, Epilepsy Foundation of America, The National Council of Churches of Christ in the U.S.A., National Concilio of America, VOLUNTEER: The National Center for Citizen Involvement, and the American Association of Museums; and an affiliated organization, The National Association of Neighborhoods, in support of appellee Council of Greenburgh Civic Associations.

INTEREST OF THE AMICI CURIAE

The *amici curiae* on whose behalf this brief is filed are major national voluntary organizations of the United States. All of them are member organizations or affiliates of Independent Sector, an organization created in 1980 to preserve and enhance our national tradition of giving, volunteering and not-for-profit initiative.

The organizations all operate primarily through local affiliates, which in turn depend on citizen participation to carry out their educational and charitable purposes.

These local affiliates often rely on the established custom of distributing notices of meetings and other literature by having volunteers place these materials in mailboxes. Even where this custom has not been established, local affiliates are increasingly turning to volunteer distribution through mailboxes, both because of the high and rising cost of postage, and because of the increasing delays in delivery by the Postal Service.

Unless the decision below is affirmed, local affiliates, on which the strength of these national organizations is based, will find it increasingly difficult to function, and, indeed, as in the situation of appellees here, to survive.

The serious restrictions on the First Amendment rights of appellees, and of the citizens of Westchester County, that flow from application of the prohibitions of 18 U.S.C. § 1725 to the activities of those organizations, are thus replicated on a national scale for the local affiliates of the *amici curiae* here, and particularly for small, local voluntary associations across the country.

SUMMARY OF ARGUMENT

Distribution of literature by voluntary organizations is a protected activity under the First Amendment, and enactments that impair the free exercise of this activity require special scrutiny. Small voluntary organizations across the country rely heavily on distribution of unstamped material by volunteers to mailboxes, and local

affiliates of national voluntary organizations will be increasingly forced to rely on mailbox distributions by volunteers in order to maintain their effectiveness. The statute as applied also amounts to an unconstitutional denial of equal protection of the law to local civic and charitable organizations.

ARGUMENT

I. Distribution of Literature by Voluntary Organizations is a Protected Activity Under the First Amendment, and Enactments That Impair The Free Exercise of this Activity Require Special Scrutiny.

The Court's traditional solicitude for the protection of First Amendment rights need scarcely be documented. In particular, the "[f]reedom to distribute information to every citizen . . . must be fully preserved." *Martin* v. *Struthers*, 319 U.S. 141, 146-147 (1943). Appellant's suggestion (appellant's brief p. 23) that "the effects of the statute on free expression" need only be weighed "against the governmental interests advanced . . . when Congress attempts in some way to regulate the content of speech . . ." overlooks the invalidation of major provisions of the Federal Election Campaign Amendments of 1974 in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), as well as a long line of cases invalidating state statutes and local ordinances under the First Amendment as incorporated into the Fourteenth Amendment, the most recent being *Village of Schaumburg* v. *Citizens For A Better Environment*, 444 U.S. 620 (1980). In *Schaumburg* the Court held unconstitutional a content-neutral local ordinance, quite specific in its provisions, but which the Court found served a legitimate legislative interest in a way that could be "better served by measures less intrusive . . ." (444 U.S. at 637).

In fact, appellant abandons its initial argument. Appellant cites *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), for the proposition that the balancing test is inapplicable "to a content-neutral statute . . . that affects

only the place and manner in which communication may occur." But *Grayned* did not involve a balancing of interests, and appellant's quotation from the *Grayned* opinion omits the first half of the quoted sentence: "Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved . . ." (408 U.S. at 116).

It is the contention of the *amici curiae* that the effect of this statute on small local organizations, and some local affiliates of national voluntary organizations, is to make effective communication impossible between the organization and its members, thereby "abridging the freedom of speech . . . ."

II. Small Local Voluntary Organizations Across the Country Rely Heavily on Distribution of Unstamped Material by Volunteers to Mailboxes; and Local Affiliates of National Voluntary Organizations Will Be Increasingly Forced to Rely on Mailbox Distribution by Volunteers in Order to Maintain Their Effectiveness.

Informal inquiries among member organizations and affiliates of Independent Sector support the evidence introduced at the trial of this case that the distribution of unstamped matter by volunteers to mailboxes is an essential means of communication between a local organization or affiliate and its constituency. This appears to be particularly true of minority organizations. One organization, the National Concilio of America, a Hispanic group, reports that many of its members do not read English and do not open stamped envelopes—which must be addressed in English—because they do not expect to be able to read the contents. Also, many of their members are transients who can only be reached by general neighborhood distributions. Telephone communication requires that the persons to be reached have telephones. The National Association of Neighborhoods, which represents approximately 500 coalitions and federations of neighborhood civic associations, reports that rising postal rates, and the urgent nature of many communications

circulated by its members, make ability to use mailboxes for delivery of unstamped matter of vital importance. Even such an established national organization as the American Red Cross reports that its affiliates in small, unstructured communities regard use of mailboxes as important to their activities.

But more important for the local affiliates of national organizations represented here is the increasing cost and delay in mail service, which makes volunteer delivery to mailboxes more and more necessary in order to maintain the essential links between individual citizens and local affiliates, which are the building blocks of voluntary associational activity protected by the First Amendment. Evidence in the record below on the difficulty and ineffectiveness of bulk mail for local distribution, and the recent and prospective increases in first-class mail rates underline the concern of the *amici curiae*.

The impracticality of employing other receptacles or points of attachment than mailboxes (door knobs, scotch tape, under-the-door insertion) is amply demonstrated in the record below.

III. The Statute as Applied Amounts to an Unconstitutional Denial of Equal Protection of the Laws to Local Civic and Charitable Organizations.

Recent postal regulations now provide exemptions from the statutory ban on private mail services competing with the U.S. Postal Service for college and university mail delivery and for very rapid (essentially less than 24-hour) delivery services, 39 CFR §§ 320.4, 320.6. The latter exemption is presumably intended to cover the expensive services provided by organizations like Federal Express and Sprint, which are more and more used by businesses and law firms.[1]

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[1] Respondent informs us that extension of the filing date for its brief in this Court to April 10th was conditioned on mailing the brief by Federal Express.

"Mailable matter" carried by Federal Express can presumably be placed in mailboxes without incurring the penalty prescribed under 18 U.S.C. § 1725, since the effect of the exemption in 39 CFR § 320.6 is to omit the requirement for payment of "lawful postage", and therefore the carrier could not be said to have "intent to avoid payment of lawful postage".

The effect of the regulation as enforced is to extend to those who can afford it a privilege that is not made available to these appellees or to the *amici curiae.*

Further, it could be argued that in fact delivery of material by local organizations could be construed to meet the requirements of Section 320.6, which provides in subsection (b) (1):

> For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be completed within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. For other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. For any part of a shipment of letters to qualify under this paragraph (b), each of the letters must be extremely urgent.

Hand deliveries accomplished by volunteers would seem necessarily to meet these time requirements from the time when the volunteer is "dispatched" to when he or she arrives at the last residence where the circulars or the material are to be delivered. For communications sent by Federal Express, the test of extreme urgency is presumably the willingness of the sender to pay the substantial additional charge. In the case of communi-

cations dispatched by hand through volunteers, the test may be the willingness of the volunteer to undertake the assignment.

There is no discernible reasonable basis for discrimination in favor of college and university organizations, and private express services mainly utilized by business entities, and against local civic associations and affiliates of national voluntary organizations.

As the court below noted, communication of the kind delivered by respondents or the *amici* often involve "urgent matters" not permitting the delay of normal mailing (490 F. Supp. at 160).

CONCLUSION

For the foregoing reasons, the *amici curiae* request the Court to affirm the judgment of the court below that 18 U.S.C. § 1725 is "in violation of the First Amendment" as applied to local civic and charitable organizations and local affiliates of national voluntary organizations.

Respectfully submitted,

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